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No. 80-1614

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR. AND
LUCILLE M. JEWETT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a remainderman's disclaimers of his interest in a testamentary trust were transfers subject to the federal gift tax because they were executed 33 years after the establishment of the trust, and 24 years after the remainderman attained his majority, and therefore were not made "within a reasonable time after knowledge of the existence of the transfer," as required by the governing Treasury Regulation.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A7-A19) is reported at 70 T.C. 430. The opinion of the court of appeals (Pet. App. A1-A6) is reported at 638 F.2d 93.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on February 18, 1981 (Pet. App. A29). The petition for a writ of certiorari was filed on March 25, 1981, and was granted on June 1, 1981 (J.A. 5). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& 1970 ed.)) are set forth at Appendix, *infra*, 1a. The relevant provisions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R.) are set forth at Appendix, *infra*, 2a-3a.

STATEMENT

1. Margaret Weyerhaeuser Jewett, the grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939, a resident of Falmouth, Massachusetts. On February 14, 1939, her will was admitted to probate. Clause Eighth of her will created a trust for the benefit of the testatrix's husband, James R. Jewett, during his lifetime, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary Cooper Jewett (now Mary C. Gaiser) for their lives. The trust, established under the will of a Massachusetts decedent, has a situs in Massachusetts (Pet. App. A8-A9). The will provided that following the death of the surviving life beneficiary, the trust remainder would be distributed in equal shares to the children of George F. Jewett then living (J.A. 9-10).

As a child of George F. Jewett, petitioner had a contingent 50% interest in the trust remainder which would vest upon the death of the surviving life beneficiary. If petitioner failed to survive that event, the share to which he would have otherwise been entitled would pass at that time to his issue by right of representation (Pet. App. A9). Petitioner was born on April 10, 1927. Accordingly, he was 12 years old at the time of his grandmother's death, when his

interest in the testamentary trust was established (Pet. App. A9-A10, A21).

Mary C. Gaiser, the mother of petitioner, is the sole surviving life beneficiary of the trust. She was born on March 7, 1901, and was living in 1972, when petitioner disclaimed his interest in the trust in favor of his issue.

On August 30, 1972, when he was 45 years old, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer" (Pet. App. A9; J.A. 15-16). The instrument provided in part as follows (Pet. App. A9-A10; J.A. 15-16):

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of

income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and

WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

On December 14, 1972, petitioner executed a second instrument, in the same form as the first document he executed on August 30, 1972. Pursuant to this second instrument, petitioner disclaimed his remaining 5% interest in his share of the trust remainder (Pet. App. A10).

The validity and timeliness of petitioner's disclaimers under Massachusetts law are not in question (Pet. App. A3). The value of the entire trust corpus was $7,912,393.63 on August 30, 1972, and $8,398,038.37 on December 14, 1972 (Pet. App. A10).

2. Petitioner filed gift tax returns for the calendar quarters ending September 30, 1972, and December 31, 1972, in which he notified the Commissioner of Internal Revenue of his execution of the dis-

claimers, but did not report as taxable gifts any amount with respect to his interest in the trust.[1] On audit, the Commissioner determined that petitioner's disclaimers were not made "within a reasonable time after knowledge of the existence of the transfer" as required by Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R.), so that his transfers were subject to the gift tax (Pet. App. A10). Deficiencies of approximately $750,000 were accordingly determined (*id.* at A7). This proceeding was then brought by petitioner in the Tax Court seeking a redetermination of the deficiencies. In a reviewed decision, the Tax Court unanimously held that petitioner's disclaimers of his interest in the trust, which were not made until 24 years after he reached his majority, were not made within a reasonable time, as required by the pertinent Treasury Regulation. The court accordingly ruled that petitioner's disclaimers were taxable gifts under Sections 2501(a) and 2511(a) of the Code (Pet. App. A11-A18).

The court of appeals affirmed, with one judge dissenting. It held that under Section 25.2511-1(c) of the Treasury Regulations, a disclaimer must be made within a reasonable time after a remainderman learns of the creation of his interest. Since petitioner disclaimed his remainder interest in his grandmother's trust approximately 33 years after that interest was created, the court concluded that his disclaimers were not made within a "reasonable time after knowledge of the existence of the transfer"

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[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts as made by both her and her husband under Section 2513 of the Code and the gift tax returns were filed accordingly (Pet. App. A8).

within the meaning of the Regulation and therefore were taxable gifts (Pet. App. A5). In so ruling, the court of appeals acknowledged that petitioner's disclaimers were valid and timely under Massachusetts law (*id.* at A3), and that its determination of the reasonable period of time permitted for disclaimers of interests for federal gift tax purposes conflicted with *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973) (Pet. App. A4 & n.3). As the court below reasoned, the term "transfer," as used in the Regulation, "means the transfer to the disclaimant of the property interest disclaimed by him" (Pet. App. A5). Since the transfer in this case occurred in 1939, the court of appeals concluded that petitioner's disclaimers in 1972 were not made within the requisite reasonable period of time (Pet. App. A1-A5).

SUMMARY OF ARGUMENT

1. Sections 2501(a) and 2511(a) of the Code impose a tax upon "the transfer of property by gift," whether the transfer is in trust or otherwise, and whether the gift is "direct or indirect." Congress intended to use the term "property" in this provision in its "broadest sense * * * reaching every species of right or interest protected by law and having an exchangeable value." It also intended to use the term "indirect" in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby, and to the extent * * * that, property, or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665 (Pt. 1), 72d Cong., 1st Sess. 39 (1932); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943).

Section 25.2511-1(c) of the Treasury Regulations on Gift Tax provides a narrow exception to this broad rule for certain disclaimers of property interests. The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property; second, the disclaimer must be unqualified, unequivocal, and effective under local law.

Although petitioner's disclaimers were timely and otherwise effective under Massachusetts law, the disclaimers were not made within a reasonable time after petitioner learned of the existence of the "transfer," *i.e.*, the creation of his remainder interest in his grandmother's trust. As the Tax Court found, petitioner did not disclaim his interest within a reasonable period of time, because he waited 24 years after he attained his majority. The court of appeals similarly found that petitioner's disclaimers —made 33 years after the creation of his interest— were not made within a reasonable period of time. On either basis, petitioner's disclaimers were not timely under the Regulation.

As the court of appeals noted, the purpose of the Regulation is to determine whether a disclaimer valid under state law, is nevertheless taxable as a gift. It is therefore not sufficient that a disclaimer meets all the requirements of state law, including timeliness. To qualify as a nontaxable transfer for federal gift tax purposes, a disclaimer must also satisfy a federal timeliness requirement. The reasonable time requirement of the Regulation is separate and distinct from the timeliness standard under state law.

This difference between state and federal timeliness requirements arises as a consequence of the different

concerns of state property law and the federal gift tax law. The federal gift tax is concerned with control over the disposition of property and with the exercise of a right to determine those who will possess, enjoy or own property or property rights. State law is primarily concerned with balancing conflicting claims to property, and protecting the rights of creditors and other third parties. To accomplish these purposes, state law may allow considerable time to pass after a person learns of a property interest before he must disclaim. On the other hand, the passage of time is crucial under the scheme of the federal gift tax, because time allows a potential recipient to engage in planning his estate by exercising control over the future interest and to wait to see whether he himself needs the property, or whether he should choose to have it pass to the next generation. Thus, even though petitioner's disclaimers were timely under state law, the passage of 33 years after the creation of his interest by means of the transfer in trust, and 24 years after attaining his majority, far exceeded a reasonable time for petitioner to wait before disclaiming his interest under Section 25.2511-1(c). The disclaimers were thus indirect transfers subject to the gift tax under Sections 2501 and 2511.

2. *Keinath* v. *Commissioner*, 480 F.2d 57 (8th Cir. 1973), upon which petitioner relies, was wrongly decided. There, the court ruled that because Section 25.2511-1(c) does not specify what is a "reasonable time," the federal courts must look to state law in making this determination (480 F.2d at 61). The court held that under prevailing common law, the holder of a vested remainder interest subject to divestment is allowed a reasonable time to disclaim the interest after the death of the life beneficiary, and

that a disclaimer within six months is considered to be made within a reasonable time (480 F.2d at 64). Thus, even though the disclaimant in that case was aware of his interest for 19 years (*id.* at 60), the court held that his disclaimer was timely and did not give rise to a taxable gift.

In so ruling, the court in *Keinath* confused the two separate requirements of the Regulation and deemed the effectiveness of a disclaimer under state law to be controlling for federal gift tax purposes. But the federal gift tax statute applies to those transfers Congress intended to subject to gift tax. Under state law, a "transfer" to a contingent remainderman may not occur until it is vested indefeasibly. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. For federal gift tax purposes, the contingent quality of a remainder interest simply goes to the question of value. Indeed, it is well established that if a person possessing a contingent remainder in a trust assigns his interest in the trust without consideration, the transfer is subject to gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Thus, contrary to the *Keinath* court's analysis a contingent remainderman such as petitioner has a valuable property right for purposes of both state property law and the federal gift tax. Here, there can be no doubt that petitioner exercised control over such a valuable right, for by disclaiming his remainder interest in his grandmother's trust, he transferred his interest in the trust to his issue. His disclaimers therefore gave rise to taxable gifts.

3. Finally, petitioner argues for the first time that it would be inequitable to apply Section 25.2511-1(c) to his disclaimers of the remainder interest devised

to him in 1939 because the Regulation was promulgated in 1958. But apart from the facts that the Regulation at issue here merely provides for a narrow category of exceptions to the comprehensive statutory provision enacted by Congress in 1932 and that the Commissioner is, in any event, free to promulgate retroactive regulations that constitute the original controlling rule (*Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936)), Section 25.2511-1(c) is not in fact being applied retroactively in this case. It applies to all gifts, including disclaimers treated as gifts, made after December 31, 1954 (23 Fed. Reg. 8904 (1958)). The transaction upon which the gift tax is imposed in this case occurred in 1972, long after the effective date of the Treasury Regulation. Petitioner is not being taxed on the transfer to him of his remainder interest upon the death of his grandmother in 1939. Rather, the tax is imposed on the relinquishment of his control over the disposition of that valuable property interest at the time of the disclaimers in 1972.

Moreover, there is no basis for petitioner's claim that without a grace period, the Regulation improperly foreclosed him at the outset from making a timely disclaimer, because in 1958 he had already held his interest for 19 years, or ten years after attaining his majority. Even on the assumption that a grace period would have been appropriate upon the promulgation of the Regulation, the facts of this case are particularly ill-suited for petitioner to advance such a claim. Here, petitioner did not disclaim his interest until 1972—14 years after the promulgation of the Regulation in question. Hence, petitioner's disclaimers were neither made within a reasonable time after learning of his interest nor within the bounds of any reasonable grace period one might hypothesize.

ARGUMENT

DISCLAIMERS OF A REMAINDER INTEREST IN A TRUST ARE TRANSFERS SUBJECT TO THE FEDERAL GIFT TAX WHEN THEY ARE EXECUTED MANY YEARS AFTER THE ESTABLISHMENT OF THE TRUST AND AFTER THE REMAINDERMAN ATTAINED HIS MAJORITY BECAUSE SUCH DISCLAIMERS ARE NOT MADE WITHIN A REASONABLE TIME AFTER THE REMAINDERMAN LEARNED OF THE EXISTENCE OF HIS INTEREST IN THE TRUST

A. The broad language of the federal gift tax statute reflects Congress' intent to tax gifts whether directly or indirectly made regardless of the means or device employed

1. Section 2501 of the Internal Revenue Code of 1954 imposes a graduated tax "on the transfer of property by gift * * * by any individual resident or nonresident." The gift tax "supplemented that laid on transfers at death, which had long been a feature of the revenue laws." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42 (1939). By taxing gifts, Congress sought to discourage circumvention of the estate tax that would otherwise occur by means of *inter vivos* transfers that would deplete taxable estates. Congress therefore defined a taxable transfer in far-reaching terms in order to reflect its intent to tax gifts in the "broadest and most comprehensive sense," and to tax "all transactions * * * whereby[,] and to the extent * * * that[,] property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932). See also S. Rep. No. 665 (Pt. 1), 72d Cong., 1st Sess. 39 (1932). See also *Smith* v.

Shaughnessy, 318 U.S. 176, 180-181 (1943); *Robinette* v. *Helvering*, 318 U.S. 184, 187 n.2 (1943). Hence, Section 2511(a) provides that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, *whether the gift is direct or indirect*, and whether the property is real or personal, tangible or intangible * * *" (emphasis added).

The fact that the statute subjects transfers to tax "whether the gift is direct or indirect" shows that Congress did not intend to condition the applicability of the gift tax upon satisfaction of common law requirements such as donative intent. Hence, if a person's actions give rise to gratuitous transfers of property, the transfer is a taxable gift whether or not the transferor intended to bestow a benefit upon the transferee. It is the objective fact of the transfer that triggers the tax. As this Court stated almost 40 years ago in *Commissioner* v. *Wemyss*, 324 U.S. 303 306 (1945)—

> Had Congress taxed "gifts" *simpliciter*, it would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" in its broadest and most comprehensive sense. * * * Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent." It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall * * * be deemed a [taxable] gift * * *."

Put another way, all transactions that result in the gratuitous transfer (or transfer for less than adequate consideration)[2] of property or property rights or interests to another, regardless of the means or device employed, constitute gifts subject to tax.

2. This case deals with a particular type of device for accomplishing a transfer of property known as a disclaimer. By means of a disclaimer, a transferee can, by refusing, to accept ownership of property, thereby indirectly cause it to pass to the next qualified person designated in a governing instrument such as a will or trust.[3] All disclaimers arguably might be deemed to fall within the broad definition of a taxable gift insofar as they indirectly accomplish a gratuitous transfer of property to another person. But the Treasury Regulations provide for a narrow exception from the gift tax for a limited category of disclaimers. Section 25.2511-1(c) sets forth the circumstances under which a gift tax-free disclaimer can be made in the following terms:

> The gift tax also applies to gifts indirectly made. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate

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[2] See Section 2512(b) of the Code.

[3] The courts have permitted disclaimers so that a person will not be compelled to accept property that he does not want, or that may be burdensome. See, *e.g.*, *Seifner* v. *Weller*, 171 S.W.2d 617, 622 (Mo. Sup. Ct. 1943); *Chilcoat* v. *Reid*, 154 Md. 378, 385, 140 A. 100, 103 (1928); *Burritt* v. *Silliman*, 13 N.Y. 93 (1855).

> property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * *.

The question presented in this case is whether petitioner's disclaimers of his remainder interest in a testamentary trust qualified as tax-free transfers under the foregoing Regulation. The Regulation establishes two separate requirements for a disclaimer to qualify as a nontaxable transfer. First, the disclaimer must be made within a reasonable time after a person learns of his rights to the property. Second, the disclaimer must be unqualified, unequivocal, and effective under local law.[4]

It is undisputed that petitioner's disclaimers were valid and effective under Massachusetts law (Pet. App. A3). Indeed, it is axiomatic that if petitioner's disclaimers were not effective under state law, there would have been no transfers to be subject to the gift tax. Hence, this case focuses on the first requirement of the Regulation, *viz.*, that the disclaimer be made within "a reasonable time" after the person becomes aware of his interest in the property.

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[4] A disclaimer of property passing by intestacy does not qualify under the Regulation because under common law (and the general state law rule) an heir at law cannot refuse to accept his intestate share. *Hardenbergh* v. *Commissioner*, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952).

Here, petitioner's disclaimers were not made within a reasonable time after he learned of the existence of his remainder interest in his grandmother's trust. That interest came into being in 1939 upon the death of his grandmother. But petitioner did not execute his disclaimers until 1972. There is nothing in the record to justify this excessive length of time. Petitioner does not claim that knowledge of the existence of his remainder interest was improperly withheld from him until 1972. Hence, one can only conclude that his delay in disclaiming his interest was purposeful. Accordingly, under the Regulation, the Tax Court properly found that petitioner did not disclaim his interest within a "reasonable" period of time because he waited 24 years after he attained his majority before executing his disclaimers (Pet. App. A15). The court of appeals likewise correctly found that petitioner's disclaimers were not made within a reasonable period of time because they were made 33 years after the creation of his remainder interest (Pet. App. A5). On either basis, petitioner's disclaimers were not timely under the first requirement of the Regulation.

We submit that there is an ample factual basis for the decision below that petitioner's disclaimers were not made within the requisite reasonable period after petitioner learned of his remainder interest and were therefore subject to the federal gift tax. Petitioner, however, argues that his disclaimers were timely because they were made during the lifetime of the life beneficiary under the trust, *i.e.*, before he ever took possession of his remainder interest under the trust. But petitioner's contention is at odds with the structure of the Regulation, which establishes two separate and independent requirements for a tax-free disclaimer: (1) validity and effectiveness under state law;

and (2) timeliness within a reasonable period after the taxpayer learns of his rights to the property. The fact that petitioner executed his disclaimers prior to his assumption of possession of the remainder interest only goes to the validity and effectiveness of the disclaimers under state law. It does not satisfy the additional requirement of the Regulation that a disclaimer be made within a reasonable period after the disclaimant learns of the existence of his interest. As we shall show, this requirement of the Regulations imposes a federal timeliness requirement that subjects to the gift tax those persons who maintain control over the disposition of property by postponing their decision to disclaim. It is precisely that type of estate planning by *inter vivos* transfer at which the gift tax is aimed. By requiring that disclaimers be made within a reasonable period after a person learns of his right to a property interest, the Regulation implements "the evident desire of Congress [in enacting the gift tax] to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech * * *" *Commissioner* v. *Wemyss*, *supra*, 324 U.S. at 306.

B. The validity of petitioner's disclaimers under state law is insufficient to bar the imposition of the gift tax because his 33-year delay in making the disclaimers enabled him to control the disposition of his interest in the trust

1. As we have noted (*supra*, page 14), Section 25.2511-1(c) of the Treasury Regulations on Gift Tax provides with respect to disclaimers that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the

transfer." Petitioner does not challenge the validity of the Regulation. Indeed, he would bear a heavy burden if he were to do so in light of this Court's longstanding deference to Treasury Regulations unless unreasonable and plainly inconsistent with the revenue statutes. See, *e.g.*, *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979); *United States* v. *Correll*, 389 U.S. 299, 307 (1967).

And surely the Regulation strikes a reasonable balance in distinguishing between those disclaimers that are effective for gift tax purposes and those that are not. If a person is to be permitted to refuse to accept an interest in property and have that interest pass to a successor without gift tax consequences, it is entirely appropriate that he should also be required to manifest that refusal promptly upon learning of his right to that property interest. Indeed, if the rule were otherwise, a person could consider at length whether a disclaimer would be the most advantageous course of action, *i.e.*, whether he would prefer to receive the assets himself or allow them to pass to his successor in interest. In appraising his options, he could belatedly measure the resources available in his own estate in order to ascertain whether he should take the property interest for his own personal needs. Thus, absent a timeliness requirement, the holder of the property interest could, perhaps up to the moment of his own death—if state law posed no barrier—engage in the very type of estate planning by *inter vivos* transfers upon which the gift tax is imposed.

The facts of this case convincingly support the decision below that petitioner's disclaimers were not "made within a reasonable time after knowledge of the existence of the transfer." Here, the remainder interest that petitioner ultimately disclaimed came

into existence upon the death of his grandmother in 1939. At that time, petitioner was almost 12 years old. Assuming that in 1939 and in the years immediately thereafter, petitioner was unaware of his interest in the trust in 1948 petitioner reached the requisite age when knowledge of his affairs could be legally attributed to him. But petitioner did not disclaim his interest in 1948 or even "within a reasonable time" thereafter. He waited 24 more years—until 1972—to do so, when he was 45 years old. And when petitioner finally disclaimed his remainder interest in the trust, even then he did not put the matter to rest in a single dispositive transaction. Rather, he acted with some degree of caution and with seeming reluctance to relinquish his hold over his remainder interest. His disclaimers were made in two installments. As the record makes clear, on August 30, 1972, petitioner first disclaimed 95% of his one-half interest in the remainder but not of income thereafter accumulated (see page 32 note 12, *infra*). Then, on December 14, 1972, he executed a similar disclaimer of the remaining 5% (Pet. App. A9-A10).

Thus, at the late hour that petitioner finally disclaimed his interest in the trust—at the age of 45—he presumably had determined that he no longer had any personal need to enjoy the benefits of that interest that would accrue to him upon the death of his then 71-year-old mother.[5] In reaching this decision, at an age that was actuarially beyond his mid-life, petitioner could more accurately predict the size of his own taxable estate and the estates of those persons

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[5] Petitioner appears to be a person of substantial wealth. His gift tax returns report taxable gifts of $2,751,502 for the period 1958-1972, excluding the interests in his grandmother's trust at issue in this case (Pet. App. A18 n.5).

who would succeed to his interest. In short, petitioner's extended 33-year holding of his remainder interest and his ultimate disclaimer of it constituted a control over property and its disposition that is the essence of a taxable gift. As the Tax Court effectively characterized the scenario (Pet. App. A18; footnote omitted):

> [P]etitioner possessed for 24 years, the effective right to determine who should ultimately receive the benefits of a 50 percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means. In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise over the disposition of property subject to the gift tax imposed by Section 2501.

2. In seeking to insulate his belated disclaimers from the gift tax, petitioner does not offer any explanation that might excuse or mitigate his delay and hesitation in making the disclaimers of his interest in the trust. As we have noted (*supra*, page 15), he does not claim that knowledge of the existence of his interest was improperly held from him. Despite the clear inference to be drawn from the undisputed facts that he was attempting to exercise control over his remainder interest for as long as possible, petitioner argues that the passage of 33 years from the date of the creation of the interest until his disclaimer is legally irrelevant.

In support of this contention, petitioner emphasizes the fact that his disclaimers were timely as a matter

of state law, which generally provides for at least a six-month period for a contingent remainderman to disclaim after his interest vests upon the death of the life beneficiary. But like the Eighth Circuit's decision in *Keinath* v. *Commissioner*, *supra*, upon which he relies,[6] petitioner's argument confuses the two requirements of Section 25.2511-1(c) of the Regulations. That provision, as we have pointed out (*supra*, pages 14-15), permits a disclaimer to be made free of gift tax if it is: (1) unequivocal and effective under local law; *and* (2) made within a reasonable time after knowledge of the existence of the transfer. The latter requirement represents a federal standard of timeliness that is separate and distinct from the timeliness standards under state law.[7] Hence, it is

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[6] The holding in *Keinath* was reaffirmed by the Eighth Circuit in its en banc decision in *Cottrell* v. *Commissioner*, 628 F.2d 1127 (1980). There, the court followed *Keinath* in a case involving the holder of a contingent remainder interest who also had a general power of appointment with respect to the interest. Three dissenting judges thought that *Keinath* was distinguishable because the disclaimant held extensive and ultimate control over the remainder interest through the general power of appointment (628 F.2d at 1132).

[7] The court in *Keinath* appeared to acknowledge the existence of a separate federal timeliness requirement. It stated (480 F.2d at 61): "Although the [taxpayers] argue for a complete state standard on the validity of a disclaimer, we think the Commissioner has the right in the Treasury Regulations to set forth the conditions under which disclaimers will be recognized. We are concerned here with the exercise of federal taxing power and state law participates only to the extent recognized in the federal statute or Treasury regulation." Accord: *Fuller* v. *Commissioner*, 37 T.C. 147, 155 (1961); *Estate of Hoenig* v. *Commissioner*, 66 T.C. 471, 477 (1976); *Estate of Halbach* v. *Commissioner*, 71 T.C. 141, 145-146 (1978). Nevertheless, the court further observed that

not sufficient that petitioner's disclaimers were timely and effective under Massachusetts law. Indeed, the two requirements of the Regulation reflect the different concerns of state property law and the federal gift tax law. As the Tax Court correctly explained (Pet. App. A16-A17):

> The Federal gift tax is concerned with control over the disposition of property and with exercises

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"[i]n determining 'reasonable time' and the related issue of when the reasonable time period commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states" (480 F.2d at 61).

But in interpreting provisions of the federal estate tax, neither this Court nor the lower courts have felt constrained to follow state law. In *Morgan* v. *Commissioner*, 309 U.S. 78 (1940), the Court held that a power of appointment that was a special power under Wisconsin law was a general power for federal estate tax purposes. The Court explained the interrelationship between federal and state law in the following terms (309 U.S. at 80-81; footnote omitted):

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.

Accord: *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932); *Lyeth* v. *Hoey*, 305 U.S. 188, 194 (1938); *United States* v. *Pelzer*, 312 U.S. 399, 402-403 (1941). See, also, *Rolin* v. *Commissioner*, 588 F.2d 368, 370 (2d Cir. 1978) (timeliness of renunciation of power of appointment determined by federal estate tax regulations); *Hibernia Bank* v. *United States*, 581 F.2d 741 (9th Cir. 1978) (deductibility of administration expense from value of gross estate determined by federal law, regardless of allowability of expense under state law).

> of the right to determine who should enjoy the fruits of ownership of property. * * * State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property * * * and the protection of the rights of creditors and other third parties * * *. While a State court might be willing to accept a renunciation of a non-possessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation.

Here, as we have noted, the facts of this case amply illustrate the sharp differences underlying state property rules and the federal gift tax. In executing disclaimers of his remainder interest 33 years after it was created, petitioner has satisfied the state law requirements of timeliness because he has not jeopardized the interests of any competing claimant or creditor. Hence, there would have been no reason for a Massachusetts court to invalidate his disclaimers of his non-possessory interest no matter how late in the day they were made. Petitioner's reliance on the validity of his disclaimers under state law is accordingly irrelevant to the question of timeliness for federal gift tax purposes. On that question, it is highly pertinent that the passage of a 33-year period has permitted petitioner to exercise substantial control over the disposition of his interest in the trust and to determine who

would succeed to that interest upon his disclaimer.[8] It is, we submit, that substantial degree of control over the disposition of an estate that implicates the policies underlying the federal gift tax.

3. Contrary to petitioner's further argument (Br. 12-16), Section 25.2511-1(c) of the Regulations did not codify the common law of disclaimer so as to permit a tax-free disclaimer as long as the disclaimer was effective and timely under state law. In support of this contention, petitioner relies upon *Brown* v. *Routzahn*, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933), as "the leading case on the federal tax impact of disclaimers" (Br. 12) and claims that the Regulation adopted the rule of that decision. In *Brown*, the court ruled that a decedent's renunciation of property devised to him by his wife was not a transfer in contemplation of death for estate tax purposes, where the renunciation was made prior to the distribution from his wife's estate. Conversely, in *Hardenbergh* v. *Commissioner*, 198 F.2d 63 (8th Cir.), cert denied, 344 U.S. 836 (1952), it was held that a renunciation by an heir at law of

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[8] Petitioner emphasizes (Br. 7) that there is a "fundamental distinction" between a disclaimer and a voluntary transfer insofar as "in a voluntary transfer the transferor selects the recipients of the property, while in a disclaimer the disclaimant can make no such selection" (*ibid.*). But the distinction makes no difference for purposes of the gift tax, which is imposed on gifts in the "broadest and most comprehensive sense" (H.R. Rep. No. 708, *supra*, at 27-28; S. Rep. No. 665 (Pt. 1), *supra*, at 39). Obviously, petitioner chose to have his interest in the trust pass to the beneficiaries of his disclaimers, rather than choosing to make other disposition of his share of the trust property after succeeding to ownership of it.

an intestate share was a transfer subject to the gift tax because under state law the heir could not refuse to take his share of the estate.

But neither of these cases supports petitioner's broad argument that Section 25.2511-1(c) of the Regulation does no more than require that a disclaimer be effective under state law. The language of the Regulation—with its additional requirement that the disclaimer be made "within a reasonable time after knowledge of the existence of the transfer"—compels the conclusion that the Regulation goes beyond the rules of *Brown* and *Hardenbergh*, neither of which involved the timeliness of a disclaimer.[9] If the draftsmen of Section 25.2511-1(c) intended to codify the rule of *Brown* v. *Routzahn*, there would have been no need to include the "reasonable time" requirement in this gift tax Regulation. To achieve the codification of *Brown* v. *Routzahn*, in accordance with petitioner's theory, the Regulation merely would have provided that a disclaimer effective under state law (which includes timeliness) is not a transfer for federal gift tax purposes.[10] Thus,

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[9] The description of *Brown* v. *Routzahn*, *supra*, in *Commissioner* v. *Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963), cited by petitioner (Br. 13), is dictum. There, the court held that the property interest transferred was includable in the decedent's gross estate because the corpus was derived from the decedent's property and not from the grandfather's estate. The case did not turn on the timeliness of a disclaimer.

[10] The amicus brief filed on behalf of the Estate of Halbach set forth several internal documents from the files of the Internal Revenue Service that discuss the treatment of *Brown* v. *Routzahn*, and *Hardenbergh* in Section 25.2511-1(c). None

whatever the extent to which the Regulation may have incorporated common law principles on disclaimer, it is clear that the "reasonable time" requirement under federal tax law and state law are separate and distinct. Indeed, as we have noted, even *Keinath*, the appellate authority favoring petitioner's position (Br. 12), supports this proposition (480 F.2d at 61).

C. Petitioner's 1972 disclaimers were not made "within a reasonable time after knowledge of the existence of the transfer" because the "transfer" occurred upon the establishment of the trust in 1939

1. Petitioner does not challenge the proposition that a 33-year period, or even a 24-year period, is not a "reasonable time" within which to disclaim property and avoid imposition of the gift tax on the transfer. In his view, the period within which he could make a tax-free disclaimer does not begin to run until the death of the surviving life beneficiary when his contingent remainder interest vests. In support of this contention, petitioner claims (Br. 16-19, 20) that he did disclaim "within a reasonable time after knowledge of the existence of the transfer" under the Regulation because the term "transfer" refers to the vesting of the remainder interest after the death of the life beneficiary. Hence, under petitioner's construction of the Regulation, his disclaimers were timely—even though they were made 33 years

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of the statements contained in these documents indicates that the Regulation intended to adopt a rule incorporating state law timeliness requirements for disclaimers. Indeed, to the extent that these documents concern *Brown* and *Hardenbergh*, it is only with respect to the question whether a disclaimant can accept or refuse an inheritance under state property law.

after the establishment of the trust—because they were made prior to "the existence of the transfer," *i.e.*, the vesting of his contingent remainder interest.

But petitioner's argument that the term "transfer" refers to the vesting of his contingent interest is little more than a variation of his erroneous contention that a valid and effective disclaimer under state law should be given controlling recognition for federal gift tax purposes. Under state law, a "transfer" to a contingent remainderman may not occur until it is vested indefeasibly. The federal gift tax statutes, however, do not require such vesting before a tax is imposed. Indeed, as the Tax Court noted (Pet. App. A14-A15), if a person possessing a contingent remainder in a trust were to assign his interest without consideration, the transfer would be subject to the gift tax. *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). Since the federal gift tax is concerned with control over the disposition of property, and the exercise of the right to determine who should enjoy property (*Burnet* v. *Guggenheim*, 288 U.S. 280, 287 (1933); *Smith* v. *Shaughnessy*, *supra*, 318 U.S. at 181; *Robinette* v. *Helvering*, *supra*, 318 U.S. at 187; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-43 (1939)), the state law policies that permit disclaimers of remainder interests within a prescribed period after vesting have no relevance to the federal timeliness requirement that a disclaimer be made "within a reasonable time after knowledge of the existence of the transfer." Indeed, if petitioner were correct that the term "transfer" referred to the vesting of his contingent remainder interest, rather than to the establishment of that interest upon the death of his grandmother in 1939, the

federal timeliness requirement of the Regulation would be rendered superfluous.

The language and structure of the Regulation confirms our submission that the term "transfer" refers to the establishment of the trust. It first provides that the gift tax applies to "all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another * * *." It then states (emphasis added) that "[w]here the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly [to] refuse to accept ownership of property *transferred from a decedent* (whether the *transfer* is effected *by the decedent's will* or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the *transfer*". In this context, the relevant "transfer" is the event that occurs as a result of the death of a decendent. Since the gift tax reaches the gratuitous *inter vivos* transfers of property, property rights or interests, the term "transfer" necessarily refers to the passing of the contingent remainder interest from the decedent (petitioner's grandmother) to petitioner upon her death in 1939 and not to the future vesting of that interest that will occur upon the death of the surviving life beneficiary.[11]

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[11] Petitioner also asserts (Br. 16) that the use of the word "transfer" in the final form of the Regulation, in place of the word "interest" as used in its proposed form ("within a reasonable time after knowledge of the existence of the *interest*" (emphasis added)) is significant. Petitioner suggests that if the word "interest" had been used in the final draft of the

Finally, if any doubt remains on this score, it is dispelled by a body of this Court's decisions in the income, gift, and estate tax area. For example, in income tax cases involving a determination of the date of the transmission of property to a testamentary trust with a remainderman, this Court held that, for purposes of determining the basis of the property to measure subsequent taxable gains or losses on its sale, the remainderman acquired the property upon the death of the testator, rather than upon the vesting of the remainder, even though the subsequent succession was uncertain. *Helvering* v. *Campbell*, 313 U.S. 15, 21 (1941); *Helvering* v. *Gambrill*, 313 U.S. 11, 14 (1941); *Helvering* v. *Reynolds*, 313 U.S. 428 (1941); *Maguire* v. *Commissioner*, 313 U.S. 1 (1941). In these cases, the Court emphasized that it is immaterial that the remainder interest may be conditional at the time of the testator's death, for the remainderman acquired

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Regulation, the decision of the court of appeals would be correct.

But there is no textual support for petitioner's distinction between the terms "transfer" and "interest." The proposed form of Section 25.2511-1(c) likewise contained the word "transfer," in the phrase "the failure to renounce within a reasonable time after learning of the *transfer* * * * will be presumed to constitute an acceptance of the property" (22 Fed. Reg. 53, 58 (1957); emphasis added). It therefore appears that the draftsmen of the Regulation used the words "transfer" and "interest" interchangeably, without drawing the distinction ascribed to them by petitioner. Indeed, the Technical Memorandum accompanying the adoption of the Regulation, which is reproduced in the Appendix at 25a-28a of the amicus brief filed on behalf of the Estate of Halbach, provides no support for petitioner's distinction between the words "transfer" and "interest."

a property interest at such time, even though he did not have the right to its possession.

There is also an analogy in the federal gift tax cases, where it is established that the gift tax is payable on the transfer of property by the donor, *i.e.*, at the time of the execution of the effective instrument, even though a future estate may be contingent upon a possible reversionary interest in the grantor. *Smith* v. *Shaughnessy*, 318 U.S. 176 (1943); *Robinette* v. *Helvering*, *supra*. Since the gift tax is imposed on the transfer measured by the value of the property when it passes from the donor, that is the relevant point in time, even though the identity of the donee may not be known at that time or the future estate may be contingent upon a possible reversionary interest in the donor.

Likewise, in estate tax cases involving charitable remainders after a revocable trust, where there is a possibility of invasion of the trust assets, the courts have held that in valuing a claimed charitable deduction for the remainder passing to charity, the value must be determined from data available at the time of the donor's death, and not at the time the charity actually assumes possession. *Merchants Bank* v. *Commissioner*, 320 U.S. 256 (1943); *Nardi* v. *United States*, 385 F.2d 343 (7th Cir. 1967); *Lincoln Rochester Trust Co.* v. *McGowan*, 217 F.2d 287 (2d Cir. 1954); *Wells Fargo Bank & Union Trust Co.* v. *Commissioner*, 145 F.2d 132 (9th Cir. 1944); Treasury Regulations on Estate Tax, Section 20.2055-2 (26 C.F.R.).

The common thread in all of these cases involving future interests is the uniform view that remainder interests are created either upon the death of the testator, or upon the execution of the *inter vivos*

trust instrument, and not when the remainder interest ripens into actual possession in the hands of the recipient. Section 25.2511-1(c) of the Regulations represents a consistent application of the very same principle in the gift tax area. Accordingly, the "transfer" in this case occurred in 1939 upon the death of petitioner's grandmother when her will took effect and created the remainder interest in her testamentary trust.

D. Petitioner's Disclaimers of His Contingent Remainder Interest Were the Transfers of a Valuable Property Right Upon Which the Gift Tax Was Properly Imposed Under the Regulations

1. Apparently recognizing that the validity of his long-delayed disclaimers under state law was insufficient, and that the pertinent "transfer" under the Regulation was the establishment of the trust in 1939, petitioner alternatively argues (Br. 12) that he had no interest to transfer until the death of the surviving life beneficiary. In support of this claim, petitioner relies upon the statement in *Keinath* that "[a] remainder subject to divestment does not convey or transfer any actual control or current beneficial interest in property to the remainderman. * * * In the instant case the remainderman * * * had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary (480 F.2d at 64).

But this argument fails to appreciate the valuable attributes of a remainder interest for purposes of both the gift tax and the law of property. Surely petitioner cannot deny that his grandmother upon her death transferred to him a property interest of considerable value that he did not have prior to her

death and that substantially increased his material wealth. A future interest, contingent or vested, is a property right with a marketable value. *Smith* v. *Shaughnessy, supra,* 318 U.S. at 180; *Chanin* v. *United States,* 393 F.2d 972, 977 (1968); *Commissioner* v. *Marshall,* 125 F.2d 943, 945 (2d Cir. 1942). As we have pointed out (*supra,* page 26), the transfer of such an interest is subject to the gift tax. *Commissioner* v. *Procter, supra.* Moreover, for purposes of porperty law, a contingent remainderman can transfer his interest, gratuitously or for consideration (L. Simes & A. Smith, *The Law of Future Interests* §§ 1857, 1858, 1859 (2d ed. 1956); *Restatement (Second) of Property (Future Interests)* § 163 (1936)), and he can often use his interest to satisfy creditors (L. Simes & A. Smith, *supra,* §§ 1922, 1923; *Restatement (Second) of Trusts, supra,* §§ 147, 162 (1959)). Although the condition precedent to petitioner's possession of the interest (survivorship) would affect the value of his remainder, as taken into account by the Commissioner (Pet. App. A14-A15 n.3), a remainder to a 45-year-old man in an $8 mililon trust, contingent upon surviving a 71-year-old life beneficiary, is obviously a property right of great value. *Smith* v. *Shaughnessy, supra; Chanin* v. *United States, supra; Commissioner* v. *Marshall, supra,* 125 F.2d at 946.

In sum, there is no basis either in the gift tax or in property law for the proposition advanced by petitioner and the *Keinath* court that a person does not have sufficient control over a remainder subject to divestment to warrant imposition of a transfer tax on the disclaimer of such an interest. Such a remainder is a valuable property right that can be valued prior to vesting. The fact that such a remain-

der may be less valuable than an indefeasibly vested remainder does not cast doubt upon the correctness of the conclusion that the disclaimer of either type of remainder is an indirect transfer subject to the gift tax. To limit the gift tax to transfers of vested remainders and exempt those of contingent remainders, as petitioner necessarily argues should be done (Br. 7), would resurrect distinctions in the law of property which this Court long ago put to rest in *Helvering* v. *Hallock*, 309 U.S. 106, 118 (1940). See also *Commissioner* v. *Marshall*, *supra*, 125 F.2d at 945. Indeed, petitioner's argument that he had nothing to disclaim proves too much, for it suggests that his acts of disclaimer were of no import and a meaningless gesture. But that is hardly the case. By his actions, petitioner determined that he would not receive a portion of the remainder interest,[12] but chose instead to have it pass to the natural objects of his bounty. This was the exercise of control over, and an *inter vivos* transfer of, a valuable property interest—a transfer to which the gift tax applies.

2. Contrary to petitioner's further argument (Br. 20-23), the decision below is not inconsistent with Congress' intent that the gift tax complement the estate tax. In support of this contention, petitioner invokes this Court's statement in *Estate of Sanford* v. *Commissioner*, *supra*, 308 U.S. at 44, that "[t]he gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed to-

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[12] Although petitioner renounced his right to 50% of the remainder of his grandmother's trust, he specifically did not renounce his right to 50% of the accumulations of income from the dates of the disclaimers (J.A. 15, 18).

gether." [13] He therefore urges that because a contingent remainder interest (conditioned on survival) would not be subject to the estate tax, its transfer should not be subject to the gift tax.

But the Court's statement in *Estate of Sanford* that the gift tax and the estate tax are in *pari materia* does not mean that the gift tax is limited to those transfers that are also includable in the transferor's gross estate. The statement in *Estate of Sanford* simply means that in enacting the gift tax, Congress sought to impose a levy on gratuitous *inter vivos* transfers that would reduce the transferor's taxable estate. The Court said as much in the sentence immediately following the quoted excerpt: "An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death" (308 U.S. at 44; footnote omitted). Moreover, the Court's later clarification of *Estate of Sanford* in *Smith* v. *Shaughnessy*, *supra*, 318 U.S. at 179, puts the matter beyond doubt. There, the Court stated: "Congress plainly pointed out that 'some' of the 'total gifts subject to gift taxes * * * may be included for estate tax purposes and some not,'" quoting H.R. Rep. No. 708, *supra*, at 45; S. Rep. No. 665 (Pt. 1), *supra*, at 48. Accord: *Cerf* v. *Commissioner*, 141 F.2d 564, 567 (3d Cir. 1944); *Commissioner* v. *Marshall*, *supra*, 125 F.2d at 947-948. Indeed, completed *inter vivos* gifts of property beyond the statutory "contemplation of death" period of Section 2035(a) are not includable

[13] *Estate of Sanford* involved the question whether there was a completed gift when the donor reserved certain powers to change the disposition of the property.

in a decedent's gross estate, but are taxed as gifts. As the Tax Court observed in denying petitioner's "Motion for Reconsideration of Findings and Opinion" (Pet. App. A23; emphasis added):

> [T]he gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, *like a simple life estate*, might under certain circumstances terminate on or before the death of a donor and therefore escape inclusion in the gross estate.

Finally, petitioner (Br. 22) pursues his argument that the decision below is inconsistent with estate tax principles by analogizing a disclaimer to a special power of appointment. His point is that the holder of a special power has broader control over appointed property than a disclaimant, and yet the exercise (or release) of a special power is not considered a gift, and the appointed property subject to the power is not includable in a holder's gross estate. But petitioner's analogy falls wide of the mark. A disclaimant's control over property more closely resembles a general power of appointment, the release of which is a taxable transfer under Section 2514 of the Code. A disclaimant, unlike the holder of a special power of appointment, can decide to accept the property for himself, in the same manner as the holder of a general power.[14] It is this characteristic of the control exercised by a disclaimant that makes a disclaimer a taxable transfer unless it is made within a reasonable time after knowledge of the existence of the property interests.

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[14] See *Cottrell* v. *Commissioner*, *supra*, 628 F.2d at 1132-1133 (Ross, J., dissenting). See page 20, note 6, *supra*.

See Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 357-359 (1979).[15]

3. Moreover, petitioner argues (Br. 25-27) for the first time that it would be "contrary to any reasonable notion of equity" (Br. 26) to apply Section 25.2511-1(c) to his disclaimers of an interest devised to him in 1939 because the Regulation was promulgated in 1958. As petitioner views the matter, the Commissioner abused his discretion under Section 7805(b) of the Code in not applying Section 25.2511-1(c) prospectively only.

But Section 25.2511-1(c) is not being applied retroactively in this case. It applies to all gifts, including disclaimers treated as gifts, made after December 31, 1954. 23 Fed. Reg. 8904 (1958). The transaction upon which the gift tax is imposed in this case occurred in 1972, long after the effective date of the Treasury Regulation. Petitioner is not being taxed on the transfer to him of his remainder interest upon the death of his grandmother in 1939. Rather, the tax is imposed on the relinquishment of

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[15] Rev. Rul. 76-156, 1976-1 Cum. Bull. 292, upon which petitioner relies (Br. 22-23), is distinguishable. There, a disclaimer of an interest in an estate gave rise to a taxable gift because the disclaimant simultaneously exercised a power of appointment granted in the will to appoint the successor in interest. On these unique facts, the Commissioner ruled that the disclaimer served only to disguise the essence of the transaction so that "the act of renunciation, rather than being an act of singular and unambiguous import, becomes uncertain as an indication or sign that the beneficiary has completed and unqualifiedly refused ownership of the property given under the will" (1976-1 Cum. Bull. at 293). Hence, the basis of the Commissioner's ruling was that the disclaimer was not unequivocal, as required by Section 25.2511-1(c) of the Regulations. Unlike this case, however, no question was raised as to the timeliness of the disclaimer.

his control over the disposition of that valuable property interest at the time of the disclaimers in 1972. Thus, petitioner cannot complain that the Commissioner is taxing a transaction that occurred prior to the effective date of the Regulation.[16]

In *Helvering* v. *Reynolds*, 313 U.S. 428 (1941), this Court sustained a Regulation under analogous circumstances. There, the taxpayer received stock from his father's testamentary trust in 1934, and sold the stock in that year. The trust acquired the stock in 1918, upon the death of the taxpayer's father. Pursuant to the applicable Treasury Regulation under the Revenue Act of 1934, the taxpayer was required to assume the 1918 basis, even though his interest in the trust was a contingent remainder. The Court upheld the application of the Treasury Regulation to the year 1934, even though it was not promulgated until 1935 (313 U.S. at 430-434). As the Court stated, "[t]he fact that the regulation was

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[16] The Regulation is not retroactive in another respect, because, until its promulgation, there were no published rules by the Treasury concerning the gift tax consequences of disclaimers made after the date of the creation of a property interest. In these circumstances, the Regulation did not change settled law but became the first controlling rule, much like a definitive judicial decision. As the Court stated in *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936):

> The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute. * * * It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

not promulgated until after the transactions in question had been consummated is immaterial. * * * To hold that [the taxpayer] had a vested interest in a hypothetical decision in his favor prior to the advent of the regulations, would introduce into the scheme of the Revenue Acts refined notions of statutory construction which would, to say the least, impair an important administrative responsibility in the tax collecting process" (*id.* at 433). Since the transaction at issue here occurred in 1972, long after the promulgation of the Regulation, this case would appear to follow *a fortiori* from *Helvering* v. *Reynolds*, *supra*.

It is no answer to assert, as do petitioner (Br. 26) and *amici*,[17] that the effect of the Regulation is retroactive insofar as "[h]olders of [the] pre-1958 interests * * * have been arbitrarily, capriciously and suddenly deprived of their existing right to refuse to accept ownership of property without the imposition of a tax." In petitioner's view, the Regulation was defective because it "made no provision for any grace period following its enactment [*sic*] within which 'transfers' made by instruments predating 1958 could effectively be disclaimed." Put another way, petitioner claims that the Regulation foreclosed him at the outset because in 1958 he had already held his remainder interest for 19 years, or ten years after attaining his majority.

To begin with, petitioner never had a right to disclaim his remainder interest free of gift tax. That tax is imposed by provisions of the Code enacted in 1932—seven years before his grandmother's death. The Regulation merely defines a narrow exception to the application of the comprehensive language of those

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[17] See Brief of Estate of Halbach, at 17.

Code provisions (see pages 11-14, *supra*). Thus, the Regulation did not deprive petitioner of any pre-existing right.[18] Moreover, even on the assumption that a grace period would have been appropriate upon the promulgation of the Regulation, the facts of this case are particularly ill-suited for petitioner to advance such a claim. Here, petitioner did not disclaim his interest until 1972—14 years after the promulgation of

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[18] Even if the Regulation could be considered to have been applied retroactively to the date petitioner acquired his interest in his grandmother's trust in 1939, the Commissioner did not abuse his discretion under Section 7805(b). This Court has ruled on several occasions that the Commissioner has the power to correct mistakes of law retroactively in the application of the tax laws to particular transactions. *Dixon* v. *United States*, 381 U.S. 68, 72 (1965); *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183-184 (1957); *Helvering* v. *Reynolds*, *supra*; *Manhattan Co.* v. *Commissioner*, *supra*. In *Dixon*, the taxpayer had relied on the Commissioner's acquiescence in a Tax Court decision that was withdrawn after the transaction in question occurred. The Court stated (381 U.S. at 79-80; footnote omitted): "Insofar as petitioners' arguments question the policy of empowering the Commissioner to correct mistakes of law retroactively when a taxpayer acts to his detriment in reliance upon the Commissioner's acquiescence in an erroneous Tax Court decision, their arguments are more appropriately addressed to Congress."

Here, unlike *Dixon*, petitioner cannot justifiably claim a detrimental reliance on any public or private position of the Commissioner to the effect that a disclaimer timely under state law is not a transfer subject to the gift tax. And, even if petitioner could somehow claim reliance on such a position, *Dixon* teaches that such reliance does not preclude the Commissioner from correcting a mistake of law and applying the new rule retroactively. Accordingly, even if the Regulation changed settled law or a prior policy of the Commissioner, there would be no bar to the application of Section 25.2511-1(c) to petitioner's disclaimers.

the Regulation in question. Hence, petitioner's disclaimers were neither made within a reasonable time after learning of his interest nor within the bounds of any reasonable grace period one might hypothesize.

4. Finally, petitioner argues (Br. 24-25) that it would be inequitable to subject his disclaimers to the gift tax because it would give impermissible retroactive effect to the new disclaimer statute, Section 2518 of the Code, which was enacted by Congress in Section 2009(b)(1) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1893.[19] Pursuant to this statute, which is effective for the disclaimer of any interest created after December 31, 1976, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest in the disclaimant is made, or the day on which the disclaimant attains age 21 (Section 2518(b)(2) and 2518(b)(2)(B)). In so contending, petitioner subscribes to the observation of the dissenting judge in the court below that "[t]he Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected" (Pet. App. A6).

But the enactment of Section 2518, which was a legislative attempt to establish a uniform federal standard for disclaimers, has no impact whatsoever upon taxable years prior to its effective date. In adding this provision to the Code, Congress was entirely neutral as to the correctness of the *Keinath* court's exclusive reliance on effectiveness of a disclaimer under state law and to the application of the federal timeliness requirement of Section 25.2511-1(c) of the

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[19] See also Brief of Mayer, Brown & Platt, at 2-3; Brief of Adelaide C. Griswold, *et al.*, at 14-17.

Regulations. The pertinent House committee report bears this out. After noting the existence of the *Keinath* decision and the "reasonable" time requirement of the Regulation, the House committee stated that Congress simply "believe[d] that definitive rules concerning disclaimers should be provided for estate and gift tax purposes to achieve uniform treatment. In addition, [Congress] believe[d] that a uniform standard should be provided for determining the time within which a disclaimer must be made" (H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66-67 (1976); footnote omitted). Hence, nothing in the committee report concerning the new statute or its effective date can attribute to Congress a purpose to exempt from the gift tax a belated disclaimer of the type at issue here prior to January 1, 1977, without regard to whether it was "made within a reasonable time after knowledge of the existence of the transfer." Indeed, in *Knetsch* v. *United States*, 364 U.S. 361, 367-370 (1960), this Court rejected much the same argument that a prospective statute demonstrated Congress' intent to allow claimed tax consequences for prior years. It is the "reasonable time" requirement of Section 25.2511-1(c) of the Regulations, and not Section 2518, that is the basis of our submission that the decision below correctly held that petitioner's disclaimers were taxable gifts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2501 (1970 ed.). IMPOSITION OF TAX.

(a) *Taxable Transfers.*

(1) *General rule.*—For the first calendar quarter of calendar year 1971 and each calendar quarter thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar quarter by any individual resident or nonresident.

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SEC. 2511. TRANSFERS IN GENERAL.

(a) *Scope.* Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

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Treasury Regulations on Gift Tax (26 C.F.R.):

§ 25.2511-1 *Transfers in general.*

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(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of

the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was de-

vised to A under the decedent's will (which also provided that all lapsed legacies and devices shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

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